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AHMAD JEFRI MOHD JAHRI

v.

PENGARAH KEBUDAYAAN & KESENIAN JOHOR & ORS

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FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ (MALAYA)
RICHARD MALANJUM CJ (SABAH & SARAWAK)
JAMES FOONG FCJ
[CIVIL APPEAL NO: 01(f)-14-2008]

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10 MARCH 2010

ADMINISTRATIVE LAW: *Judicial review - Remedies - Declaration - Appellant filed writ of summons and statement of claim seeking declaration that his dismissal by respondents void and of no effect - Decision to dismiss*

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appellant made under statutory law by respondents acting within scope of such statutory power - Appropriate procedure for use in judicial review - Whether challenge to respondent's decision can only be commenced by way of judicial review under O. 53 Rules of the High Court 1980

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The appellant was a government officer attached to the Ministry of Culture, Arts and Tourism since 16 September 1993. He had a dispute with his superior and refused to turn up for work since 28 March 2001. On 25 January 2003, his solicitors wrote to the respondents enquiring about his employment status. On 7 February

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2003, they were informed that the appellant was dismissed from the government service since 25 October 2001 *vide* a gazette notification dated the same day. On 15 January 2004, the appellant filed a writ of summons and statement of claim against the respondents seeking *inter alia* a declaration that his dismissal by the respondents is void

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and of no effect and that he is still a government officer in the said Ministry. The respondents duly filed an application to strike out the appellant's writ and statement of claim on the ground that it is an abuse of the process of the court by commencing a writ action rather than an application for judicial review under O. 53 Rules of

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the High Court 1980 ('RHC'). The High Court allowed the respondents' striking out application. The appellant appealed to the Court of Appeal and lost. He then sought leave to appeal from the Federal Court. Leave was granted based on two questions of law for determination: (i) whether pursuant to the amendment to O. 53

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RHC *vide* gazette notification P.U. (A) 342/2000 with effect from 22 September 2000, any application to challenge the decision of a

public authority, can only be commenced by way of a judicial review under O. 53 RHC; and (ii) whether it is an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing an application for judicial review under O. 53 RHC thereby evading the clear requirement of O. 53 RHC. The thrust of the appellant's argument is that O. 53 RHC is not the only mandatory procedure for an aggrieved party seeking relief against the decision of a public body. He should be allowed greater flexibility of approach either by proceeding under O. 53 RHC or by writ or originating summons.

Held (dismissing the appeal with costs)
Per James Foong FCJ delivering the judgment of the court:

(1) For the appellant to be amenable for judicial review there must be the presence of a public law element necessary to attract the remedies of administrative law. Here, the public law element was from both the source and the nature of the decision of the respondents. The appellant was an officer within s. 3 of the Public Officers (Conduct And Discipline) Regulations 1993 (Amended) 2002 ('the Regulations'). The Regulations is a statutory enactment made pursuant to cl. (2) of art. 132 of the Federal Constitution and it applies to an officer throughout the period of his service. The appellant was absent from work without leave or prior permission or reasonable cause for seven consecutive working days and could not be traced. After complying with reg. 26 and when the appellant did not respond, the respondents duly published in gazette the dismissal of appellant as required under subregulation (7) of the Regulation. The decision to dismiss the appellant was made under a statutory law by a body which acted within the scope of such statutory power. Though this decision involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulation on the conduct and dismissal of the appellant underpins the public law element in this case. Here, a special statutory provision bears directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary to attract the remedies of administrative law making it amenable for judicial review. *R v. East Birkshire Health*

A *Authority, Ex parte Walsh* (dist); *Wendal Swann v. Attorney General of the Turks and Caicos Islands* (dist). (paras 35, 36 & 37)

(2) On the use of the correct procedure in a case where an B aggrieved person can direct and pursue his complaint against a public authority in a court of law for a decision made by them affecting him, s. 41 of the Specific Relief Act 1950 ('the Act') arms the court with the statutory authority to grant a declaration. Order 15 rule 16 RHC also provides the High C Court with such power. However, O. 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s. 41 of the Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to D follow. When such an explicit procedure is created (as compared to a general provision set out under O. 15 r. 16 RHC) to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 RHC, otherwise it is liable to be struck off for abusing E the process of the court. However, there are exceptions "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating F summons", or where the claim is against the public authority for negligence. *O'Reilly v. Mackman* (foll); *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* (refd). (para 61)

(3) Challenge on the use of appropriate procedure in judicial review G is very much fact based. It is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a H mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private I law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Much

depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in another form. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in limited and exceptional circumstances. (paras 62 & 63)

(4) The appellant's claim here for infringement of his rights by the respondents is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. This court agrees with the courts below that the appellant's writ should be struck off as an abuse of the court's process. (paras 64 & 65)

Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah seorang pegawai kerajaan yang bekerja dengan Kementerian Kebudayaan, Seni dan Pelancongan sejak 16 September 1993. Beliau telah bertikai dengan pegawai atasannya dan enggan datang kerja sejak 28 Mac 2001. Pada 25 Januari 2003, peguamcaranya menulis kepada responden-responden dan bertanya tentang status pekerjaannya. Pada 7 Februari 2003, mereka telah diberitahu bahawa perayu telah dipecat dari perkhidmatan kerajaan sejak 25 Oktober 2001 melalui suatu pemberitahuan warta bertarikh hari yang sama. Pada 15 Januari 2004, perayu memfailkan suatu writ saman dan pernyataan tuntutan terhadap responden-responden menuntut antara lain suatu deklarasi bahawa pemecatannya oleh responden-responden adalah batal dan dan tidak mempunyai kesan dan bahawa beliau masih lagi pegawai kerajaan dalam Kementerian tersebut. Responden-responden kemudiannya memfailkan sesuatu permohonan untuk membatalkan writ dan pernyataan tuntutan perayu atas alasan bahawa ia merupakan suatu penyalahgunaan proses mahkamah dengan memulakan suatu tindakan writ dan bukan suatu permohonan untuk semakan kehakiman di bawah A. 53 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Tinggi membenarkan permohonan responden untuk pembatalan. Perayu merayu ke Mahkamah Rayuan dan kalah. Beliau selepas itu menuntut kebenaran untuk merayu dari Mahkamah Persekutuan. Kebenaran diberi berdasarkan dua soalan-soalan undang-undang untuk ditentukan: (i) sama ada menurut pemindaan kepada A. 53 KMT pemberitahuan warta P.U. (A) 342/2000 pada 22 September 2000, apa-apa permohonan untuk mencabar keputusan sesuatu pihak

A berkuasa awam, hanya boleh dimulakan melalui semakan kehakiman di bawah A. 53 KMT; dan (ii) sama ada ia adalah penyalahgunaan proses mahkamah untuk memulakan prosiding melalui writ dan pernyataan tuntutan untuk mencabar keputusan sesuatu pihak berkuasa awam dan bukan dengan memfailkan suatu permohonan
B untuk semakan kehakiman di bawah A. 53 KMT dan dengan itu mengelak dari keperluan nyata A. 53 KMT. Teras utama hujahan perayu ialah bahawa A. 53 KMT bukanlah prosedur mandatori tunggal bagi suatu pihak terkilan yang menuntut relief terhadap keputusan sesuatu pertubuhan awam. Beliau sepatutnya diberikan
C lebih fleksibiliti pendekatan sama ada melalui penggunaan A. 53 KMT atau melalui writ atau saman pemula.

Diputuskan (menolak rayuan dengan kos)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

D **(1)** Bagi perayu untuk tertakluk kepada semakan kehakiman mesti terdapat kehadiran elemen undang-undang awam yang perlu untuk menarik remedi-remedi undang-undang pentadbiran. Di sini, elemen undang-undang awam adalah dari kedua-dua
E sumber dan sifat keputusan responden-responden. Perayu merupakan pegawai seperti yang dimaksudkan dalam s. 3 Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) (Dipinda) 2002 ('Peraturan-peraturan'). Peraturan-peraturan ialah satu enakmen statutori yang dibuat menurut kl. (2) Perkara
F 132 Perlembagaan Persekutuan dan ia digunapakai kepada seseorang pegawai sepanjang masa perkhidmatannya. Perayu juga tidak menghadiri kerja tanpa cuti atau kebenaran sebelumnya atau kausa munasabah untuk tujuh hari kerja berturut-turut dan tidak dapat dikesani. Selepas mematuhi Peraturan 26 dan apabila
G perayu tidak memberi respons, responden-responden masing-masing menerbit dalam warta pemecatan perayu seperti yang dipertuntukan di bawah peraturan bawahan (7) Peraturan tersebut. Keputusan untuk memecat perayu telah dibuat di bawah undang-undang statutori oleh suatu pertubuhan yang
H bertindak dalam skop kuasa statutori sebegitu. Walaupun keputusan ini melibatkan pemecatan seorang pekerja oleh majikan, seperti seorang tuan memecat orang suruhannya, yang merupakan suatu perkara undang-undang persendirian, fakta bahawa terdapat syarat-syarat dan batasan-batasan statutori yang
I dikenakan oleh Peraturan atas kelakuan dan pemecatan perayu menguatkan elemen undang-undang awam dalam kes ini. Di

sini, suatu peruntukan statutori khas berhubung terus atas hak suatu pihak berkuasa awam memecat perayu. Ini memasukkan elemen undang-undang awam yang diperlukan untuk menarik remedi-remedi undang-undang pentadbiran menjadikannya tertakluk kepada semakan kehakiman. *R v. East Birkshire Health Authority, Ex parte Walsh* (dibezakan); *Wendal Swann v. Attorney General of the Turks and Caicos Islands* (dibezakan).

(2) Berkenaan dengan penggunaan prosedur betul dalam kes di mana orang terkilan boleh mengarahkan dan menuntut aduannya terhadap satu pihak berkuasa awam dalam sebuah mahkamah undang-undang bagi satu keputusan yang dibuat oleh mereka yang mempunyai kesan ke atasnya, s. 42 Akta Relief Spesifik 1950 ('Akta') menyediakan mahkamah dengan kuasa statutori untuk membenarkan suatu deklarasi. Aturan 15 k. 16 KMT juga menyediakan Mahkamah Tinggi dengan kuasa sebegitu. Walau bagaimanapun, A. 53 KMT menetapkan suatu prosedur spesifik untuk sesuatu pihak terkilan yang menuntut relief, menggabungkan suatu deklarasi (seperti yang disediakan oleh s. 41 Akta) terhadap pihak berkuasa awam bagi pelanggaran haknya yang beliau berhak dilindungi di bawah undang-undang awam, untuk mengikut. Apabila suatu prosedur sungguh jelas telah diwujudkan (jika dibandingkan dengan suatu peruntukan am yang dinyatakan di bawah A. 15 k. 16 KMT) untuk tujuan ini, sebagai kanun am semua permohonan sebegini untuk relief mesti dimulakan mengikut apa yang ditetapkan dalam A. 53 KMT, kalau tidak ia boleh dibatalkan kerana menyalahgunakan proses mahkamah. Walau bagaimanapun, terdapat pengecualian "terutamanya di mana ketidaksahan sesuatu keputusan timbul sebagai isu kolateral dalam tuntutan bagi pelanggaran hak seorang plaintif berbangkit di bawah undang-undang persendirian atau di mana satu pihak pun tidak membantah kepada penggunaan prosedur melalui writ, atau saman pemula", atau di mana tuntutan ialah terhadap pihak berkuasa awam atas kecuaian. *O'Reilly v. Mackman* (diikuti); *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* (dirujuk).

(3) Cabaran atas penggunaan prosedur yang patut dalam semakan kehakiman adalah berdasarkan fakta. Ia merupakan perlu bagi seorang hakim apabila memutuskan atas sesuatu perkara untuk

pertamanya menentukan sama ada ada elemen undang-undang awam dalam pertikaian itu. Jika tuntutan bagi pelanggaran hanya berdasarkan prinsip-prinsip substantif undang-undang awam proses yang patut seharusnya melalui A. 53 KMT. Jika ia merupakan suatu campuran undang-undang awam dan persendirian mahkamah mesti menentukan mana satu antara mereka lebih utama. Jika ia mempunyai elemen undang-undang awam yang substantif prosedur di bawah A. 53 KMT mesti digunakan. Kalau tidak ia mungkin diketepikan atas alasan bahawa ia menyalahgunakan proses mahkamah. Tetapi jika perkara tersebut di bawah undang-undang persendirian walaupun berhubung dengan pihak berkuasa awam, jalan untuk memulakan tindakan sebegitu di bawah A. 53 KMT tidak sesuai. Banyak bergantung pada fakta-fakta kes tersebut. Tetapi secara amnya mahkamah seharusnya berhati-hati dalam membenarkan suatu perkara yang sepatutnya dilaksanakan melalui A. 53 KMT diteruskan dalam bentuk lain. Apabila tujuan kanun ini adalah untuk kepentingan pentadbiran yang bagus, kanun ini mesti diikuti, kecuali dalam keadaan-keadaan terbatas dan luarbiasa.

(4) Tuntutan perayu di sini bagi pelanggaran hak-haknya oleh responden-responden hanya berasaskan undang-undang awam. Tidak ada apa-apa kesan penglibatan undang-undang persendirian dan keadaan-keadaan tidak mewajarkannya sebagai suatu pengecualian kepada kanun am. Mahkamah ini bersetuju dengan mahkamah-mahkamah bawahan bahawa writ perayu sepatutnya dibatalkan sebagai suatu penyalahgunaan proses mahkamah.

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

Council of Civil Service Union v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia [2007] 3 CLJ 377 CA ***(refd)***

Ghozi Abu Bakar v. Majlis Angkatan Tentera [2006] 4 CLJ 291 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

McLaren v. The Home Office [1990] ITLR 338 ***(refd)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(foll)***

R v. East Birkshire Health Authority, Ex parte Walsh [1985] 1 QB 152 ***(dist)***

R v. Home Secretary, Ex parte Benwell [1985] 1 QB 554 ***(dist)***
Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2009] 1 CLJ 192 CA ***(refd)***
Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee [1992] 1 All ER 705 ***(refd)***
Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(dist)***
Teh Guan Teik v. Inspector General of Police & Anor [1998] 3 CLJ 153 FC ***(refd)***
Wendal Swann v. Attorney General of the Turks and Caicos Islands [2009] UKPC 22 ***(dist)***
YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC ***(dist)***

Legislation referred to:
Federal Constitution, arts. 63, 132(2)
Government Proceedings Act 1956, s. 29
Legal Profession Act 1976, s. 46A
Public Officers (Conduct And Discipline) Regulations 1993 (Amended) 2002, regs. 3, 26
Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19(1)(b), (d), O. 53 rr. 1, 2(1), (2), (3), 3(1), (2), (3), (4), (6), 5(1)
Specific Relief Act 1950, ss. 41, 54

Other source(s) referred to:
Halsbury Laws of England, 4th edn, 2001 Reissue, vol 1(1), para 61

For the appellant - Karpal Singh Ram Singh (Ramkarpal Singh Karpal Singh, Subramaniam Nair & Ebrina Zubir with him); M/s Karpal Singh & Co
For the respondent - Hjh Azizah Hj Nawawi SFC

[Appeal from Court of Appeal; Civil Appeal No: J-01-11-2007]

[Editor's note: For the Court of Appeal judgment, please see Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473]

Reported by Susheila Sreedharan

JUDGMENT

James Foong FCJ:

Introduction

[1] This appeal concerns the appropriate procedure for use in judicial review.

[2] The facts of this case are as follows: The appellant was a government officer attached to the Ministry of Culture, Arts and Tourism since 16 September 1993. He had a dispute with his superior and refused to turn up for work since 28 March 2001. On 25 January 2003, his solicitors wrote to the respondents enquiring about his employment status. They were informed on 7 February 2003 that the appellant was dismissed from the government service since 25 October 2001 *vide* a gazette notification number 11898 dated the same day. About a year later, on 15 January 2004, the appellant filed a writ of summons and statement of claim against the respondents seeking the following reliefs:

(a) a declaration that his dismissal by the respondents is void and of no effect and that he is still a government officer in the said Ministry;

(b) an inquiry be conducted into his salary and entitlement which he ought to receive as a government servant;

(c) damages for wrongful dismissal;

(d) interest and costs.

[3] Responding to this, the respondents filed an application under O. 18 r. 19(1)(b) or (d) of the Rules of High Court 1980 (RHC) to strike out the appellant's writ and statement of claim on the ground that it is an abuse of the process of the court by commencing a writ action rather than an application for judicial review under O. 53 RHC.

[4] The High Court allowed the respondents' application to strike out the appellant's writ and statement of claim. Dissatisfied with this decision, the appellant lodged an appeal to the Court of Appeal and lost. He then sought leave to appeal from this court. Leave was granted based on two questions of law for determination:

> Question 1
>
> Whether pursuant to the amendment to Order 53 RHC 1980 *vide* gazette notification P.U. (A) 342/2000 with effect from 22.9.2000, any application to challenge the decision of a public authority, can only be commenced by way of a judicial review under Order 53 RHC 1980.

Question 2

Whether it is an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing an application for judicial review under Order 53 RHC 1980 thereby evading the clear requirement of Order 53 RHC 1980.

[5] The thrust of the appellant's argument is that O. 53 RHC is not the only mandatory procedure for an aggrieved party against the decision of a public body to seek relief. He can proceed by way of a writ or an originating summons. He should not be restricted to apply for judicial review under O. 53 RHC. He should be allowed greater flexibility of approach either by proceeding under O. 53 RHC or by writ or originating summons.

[6] To fully appreciate this contention, let us begin by setting out the common law which accepts that the High Court has a supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or charged with the performance of public acts and duties. The High Court does it by way of judicial review. In brief, judicial review provides a means by which judicial control of administrative action is exercised – see *Council of Civil Service Union v. Minister for the Civil Service* [1985] AC 374 @ 408.

[7] In Malaysia, the exercise of the supervisory jurisdiction by the High Court over such bodies is found in O. 53 RHC bears the heading: "Application For Judicial Review". And r. 1 of O. 53 RHC reads:

This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified.

[8] Paragraph 1 of the Schedule to the Courts of Judicature Act 1964 reads:

Prerogative writs

Power to issue to any person or authority directions, order or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.

[9] However O. 53 r. 2(1) RHC excludes "an order for *habeas corpus*" but under r. 2(2) it says that "An application for judicial review may seek any of the said reliefs, including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter".

[10] But a relief by way of a declaration is also provided for under O. 15 r. 16 RHC which says:

> No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[11] It was due to this provision (O. 15 r. 16 RHC) that before the current O. 53 RHC was amended on 22 September 2000, there were a series of cases concerning the appropriate procedure to be used when seeking a declaratory judgment against a decision of a public authority: by way of a writ action or under the procedure as set out in O. 53 RHC (before the amendment to the current position).

[12] The heading of the pre-amended O. 53 RHC reads: "Application for order of *mandamus*, prohibition, *certiorari*, etc" and under r. 1(1) it says that "No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule". The Federal Court in *Teh Guan Teik v. Inspector-General of Police & Anor.* [1998] 3 CLJ 153, decided that a claim for a declaratory relief by way of a writ action against the decision of a public authority is permitted despite concurrent remedies set out in the then O. 53 RHC.

[13] Now with the inclusion of a relief for a declaration in the current amended O. 53 RHC, the issue previously raised ie, whether by way of writ or originating summons as compared to an application made under O. 53 has taken a new angle and a different dimension. In addition to a relief for a declaration, the current O. 53 r. 2(3) RHC also allows the court to "make any orders, including an order of injunction or monetary compensation: Provided always that the power to grant injunction shall be exercised in accordance with the provisions of s. 29 of the Government Proceedings Act 1956 and s. 54 of the Specific Relief Act 1950".

[14] And under the current O. 53 r. 5(1) RHC, the award of damages to an applicant in such application is allowed.

[15] Then one may enquire as to why the appellant, and like many others (in the various cases soon to be cited) insist on commencing their actions by writ or originating summons rather than by way of an application for judicial review under O. 53 RHC? Generally, this is due to the stringent conditions or rules imposed by O. 53 RHC such as:

1. Under O. 53 r. 3(6)

> An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

2. Under O. 53 r. 3(1):

> No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.

3. Under O. 53 r. 3(2):

> An application for leave must be made *ex parte* to a judge in chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

4. Under O. 53 r. 3(3) RHC:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

5. Under O. 53 r. 3(4):

> The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

[16] One may ask what is the purpose of these conditions? The basic objective is to protect those entrusted with the enforcement of public duties "against groundless, unmeritorious or tardy harassment

A that were accorded to statutory tribunals or decision making public authorities by O. 53, and which might have resulted in the summary, and would in any event have resulted in the speedy disposition of the application, is among the matters fit to be taken into consideration by the judge in deciding whether to exercise his
B discretion by refusing to grant a declaration ..." – *O'Reilly v. Mackman* [1982] 3 All ER 1124 @ 1133. Further, it is aimed to reduce delay in resolving such application in the interest of good administration. As Lord Diplock in *O'Reilly v. Mackman (supra)* reiterated, "The public interest in good administration requires that
C public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

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[17] Set against these principles and conditions one will immediately note that the appellant is handicap by the time limit (amongst other things) in bringing an application for judicial review under O. 53 r. 3(6) RHC.

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[18] But be that as it may, let us return to the principal issue of whether the appellant can commence his action by writ or originating summons instead of judicial review under O. 53 RHC. If our answer is in the negative, then inevitably the appellant's writ must be struck of for abusing the process of the court.

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[19] In *O'Reilly v. Mackman (supra)* the House of Lords in England answered this question in the following fashion. Lord Diplock delivering the opinion of the court first set out the development of the law on judicial review and then highlighted the
G advantages and disadvantages of O. 53 which is in *pari materia* to our current O. 53 RHC. He then continued:

> Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can
H be obtained on an application for judicial review, as can also remedies for infringement of rights under private law if such infringements should be involved, it would in my view as a general rule be contrary to public policy, and an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to
I protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O. 53 for the protection of such authorities.

> My Lords, I have described this as a general rule, for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the validity of the decision arise as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis: a process that your Lordship will be continuing in the next case in which judgment is to be delivered today (see *Cocks v. Thanet DC* [1982] 3 All ER 1135.

[20] The *ratio* of this case is: if the claim for infringement is based solely on substantive principles of public law then relief must be by way of an application for judicial review under O. 53 RHC. If it was commenced by writ or by originating summons then this would be considered an abuse of the court's process and should be struck out under O. 18 r. 19(1) RHC. But if the matter is under private law though concerning a public authority, O. 53 RHC is not suitable. But the distinction and the boundaries between public law and private law are difficult to ascertain in practice though in principle it is clear. Further, what would happen if a matter is a mixture of public law and private law? In our instant appeal, there is also the argument that O. 15 r. 16 RHC read with s. 41 of the Specific Relief Act 1950, allows a claimant seeking declaratory relief to commence his claim by writ or originating summons.

[21] In view of this, let us begin by first asking ourselves a preliminary question: is the appellant's complaint or grievance amenable for judicial review (before even considering whether the procedure adopted by him is appropriate)? If his complaint is not amenable for judicial review then there is no dispute as to the procedure adopted since he is at liberty to commence his action by way of writ or originating summons. So first we have to determine the parameters of matters which are amenable for judicial review.

[22] It is widely accepted that not every decision made by an authoritative body is suitable for judicial review. To qualify there must be a sufficient public law element in the decision made. For this, it is necessary to examine both the source of the power and the nature of the decision made; whether the decision was made under a statutory power (see para. 61 *Halsbury Laws of England*, 4th

A edn, 2001 Reissue, vol. 1(1)). To illustrate this, we will refer to a number of authorities involving dismissal from service by a public authority or a purported public authority.

[23] In *R v. East Birkshire Health Authority, Ex parte Walsh* [1985] 1
B QB 152, the applicant was a senior nursing officer employed by the respondent under a contract of service. He was dismissed by the respondent's district head nursing officer for misconduct. He applied for judicial review under O. 53 for an order of *certiorari* to quash the dismissal. The respondent raised a preliminary issue as to whether
C the appellant is entitled to apply for judicial review since the dispute is a private law matter involving the dismissal of a servant by a master. Being a private law matter, judicial review is not appropriate. The High Court dismissed the preliminary objection based primarily on this ground:

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> The public may have no interest in the relationship between the servant and master in an 'ordinary' case, but where the servant holds office in a great public service, the public is properly concerned to see that the authority employing him acts towards him lawfully and fairly. It is not a pure question of contract. The public
E is concerned that the nurses who serve the public should be treated lawfully and fairly by the public authority employing them …

[24] This decision was overturned in the Court of Appeal where Sir John Donaldson MR, delivering one of the three judgments of
F the court declared:

> … Employment by a public authority does not *per se* inject any element of public law. Nor does the fact that the employee is a "higher grade" or is an "officer". This only makes it more likely that there will be special statutory restrictions upon dismissal, or other
G underpinning of his employment: see per Lord Reid in *Malloch v. Aberdeen Corporation*, at p. 1582. It will be this underpinning and not the seniority which injects the element of public law. Still less can I find any warrant for equating public law with the interest of the public. If the public through Parliament gives effect to that interest by means of statutory provisions, that is quite different, but the
H interest of the public *per se* is not sufficient.
>
> The ordinary employer is free to act in breach of his contracts of employment and if he does so his employee will acquire certain private law rights and remedies in damages for wrongful dismissal, compensation for unfair dismissal, an order for reinstatement or re-
I engagement and so on. Parliament can underpin the position of public authority employees by directly restricting the freedom of the

> public authority to dismiss thus giving the employee "public law" rights and at least making him a potential candidate for administrative law remedies. Alternatively it can require the authority to contract with its employees on specified terms with a view to the employee acquiring "private law" rights under the terms of the contract of employment. If the authority fails or refuses to thus create "private law" rights for the employee, the employee will have "public law" rights to compel compliance, the remedy being *mandamus* requiring the authority so to contract or a declaration that the employee has those rights. If, however, the authority gives the employee the required contractual protection, a breach of contract is not a matter of "public law" and gives rise to no administrative law remedies.

[25] So based largely on the fact that the respondent was given the right to enter into a contract of employment with the applicant, which includes the right of dismissal, the Court of Appeal found no public law element in the applicant's complaint to entitle him to the administrative remedies sought in the judicial review.

[26] But if there is a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff then this may inject in the element of public law to attract the remedies provided under administrative law. This is elaborated by Sir John Donaldson MR in the same case *(R v. Berks Authority, Ex p Walsh)* where he said:

> In all three cases there was a special statutory provision bearing directly upon the right of a public authority to dismiss the plaintiff. In *Vine v. National Dock Labour Board* [1957] AC 488 the employment was under the statutory dock labour scheme and the issue concerned the statutory power to dismiss given by that scheme. In *Ridge v. Baldwin* [1964] AC 40 the power of dismissal was conferred by statute: section 191(4) of the Municipal Corporations Act 1882 (45 & 46 Vict. c.50). In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 again it was statutory: section 3 of the Public Schools (Scotland) Teachers Act 1882 (45 & 46 Vict. c.18). As Lord Wilberforce said, at pp. 1595-1596, it is the existence of these statutory provisions which injects the element of public law necessary in this context to attract the remedies of administrative law ...

[27] Soon after the Court of Appeal decision in *R v. East Birkshire Health Authority, Ex parte Walsh (supra)*, the High Court in another case *R v. Home Secretary, Ex parte Benwell* [1985] 1 QB 554, decided that a public servant who was dismissed by the authority was amenable for judicial review under O. 53. But here the distinction

A is on the performance of the respondent's duty imposed in part by statute. To fully appreciate this distinction, we append below the facts of this case:

[28] The complaint was a prison officer. He was charged for B disobeying orders contrary to certain paragraphs of the Code of Discipline for Prison Officers. The officer, who held the disciplinary enquiry recommended that the applicant be severely reprimanded. The prison department did not accept this recommendation and instead gave the applicant notice of its intention to dismiss him. C The applicant then appealed and eventually the Secretary of State decided that the applicant should be dismissed. The applicant applied for judicial review and for an order of *certiorari* to quash the decision of the State Secretary.

D **[29]** And this is what the High Court found:

> In this case, however, it is my opinion that in making a disciplinary award of dismissal, the Home Office (to use a comprehensive term to include the department and the Secretary of State so distinguished by the respondent itself in this case) was performing E the duties imposed upon it as part of the statutory terms under which it exercises its power. I conclude therefore that this court in the exercise of its supervisory jurisdiction can come to the aid of the applicant in this case and I am glad that it can.

[30] This principle was subsequently reiterated by Lord Wolf in F *McLaren v. The Home Office* [1990] ITLR 338 where he declared:

> There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under G the prerogative or by statute to which the employer or the employee is entitled or required to refer dispute affecting their relationship.

[31] But in a more recent case of *Wendal Swann v. Attorney General* H *of the Turks and Caicos Islands* [2009] UKPC 22, handed down only on 21 May 2009, by the Judicial Committee of the Privy Council, a complaint for non-payment of arrears by a public servant was deemed to be a private law matter and therefore not amenable for judicial review. To ascertain whether this was a move to change I established principles we scrutinized the facts which are:

[32] The appellant was appointed chairman of the Public Service Commission of the Turks and Caicos Islands (PSC) by the Governor. His remuneration was $90,000 a year. In November 2006, at a meeting of the Cabinet, presided over by the Governor, it was decided that there would be a reduction of the remuneration of the PSC chairman to $30,000. This was communicated to the appellant. Dissatisfied, the appellant filed an application for judicial review. The High Court refused leave on the ground that the appellant's claim is essentially for damages caused by an alleged breach of agreement concerning his salary. This could be enforceable by a writ action rather than by way of a judicial review. Unhappy over this, the appellant appealed to the Court of Appeal which affirmed the decision of the High Court. This caused the matter to be referred to the Privy Council.

[33] The Privy Council (without citing any authority) came to this conclusion:

> The appellant's complaint is that he was wrongly deprived of his remuneration of $90,000 a year for a period of three months (or thereabouts), during which he was only paid at the rate of $30,000 a year. In order to found a legal claim on that complaint, the applicant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of PSC.
>
> In the Board's view, the only basis for advancing such a right, in the light of the evidence and the arguments which have been presented, arises out of conversations which, according to the appellant, he had with the Governor and the Chief Secretary, in which they "invited" him "to continue in the office of chairman on (a full time) basis" and "on the basis that the base salary was to be ... $90,000, ... per annum", and that he "decided to accept the challenge, including taking up residence in Grand Turk", which he duly did (quoting from paragraphs 10 to 13 of the appellant's first affidavit, sworn on 26 January 2007).
>
> Accordingly, the appellant's complaint amounts to a straightforward private law claim for around $15,000, being the difference over a period of three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of this entitlement is a conversation, or a serves of conversations, described in paragraphs 10 to 13 of his affidavit, cited in paragraph

A 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on estoppel), and whether it is made out will turn on oral evidence.

In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should
B have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel) ...

[34] By what is stated above, we perceived that this decision of the
C Privy Council is based on the fact that the appellant's claim is for breach of contract rather than *per se* against the decision of the authority. This being a private law matter has little or no public law element. Thus, it is more appropriate to commence the action by writ rather than by judicial review under O. 53.

D **[35]** Having considered the persuasive authorities cited above, we conclude that for the appellant to be amenable for judicial review there must be the presence of a public law element necessary to attract the remedies of administrative law. In this instant case we found this from both the source and the nature of the decision of
E the respondents. The appellant was an officer within reg. 3 of the Public Officers (Conduct And Discipline) Regulations 1993 (Amended) 2002 (the Regulations). "Officer" under this section "means a member of the public service of the Federation". This Regulation is a statutory enactment made pursuant to cl. (2) of
F art. 132 of the Federal Constitution and it applies to an officer throughout the period of his service. He was absent from work without leave or prior permission or reasonable cause for seven consecutive working days and could not be traced. So under reg. 26 of the Regulations:

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(1) Where an officer is absent from duty without leave or without prior permission or without reasonable cause for seven consecutive working days and cannot be traced, his Head of Department shall cause a letter to be delivered personally or sent by A.R. registered
H post to the officer at his last-know address, directing the officer to immediately report for duty.

(2) If, after the letter is delivered:

(a) the officer reports for duty; or

I (b) the officer fails to report for duty or no news is heard from him,

his Head of Department shall submit a report to the appropriate Disciplinary Authority and the Disciplinary Authority shall institute disciplinary action against the officer.

(3) If the letter cannot be delivered in person to the officer by reason of the fact that he is no longer residing at his last-known address or if the A.R. registered letter is returned undelivered, the Head of Department shall report the matter to the Disciplinary Authority having jurisdiction to impose a punishment of dismissal or reduction in rank upon the officer.

(4) The appropriate Disciplinary Authority shall, upon receiving the report referred to in subregulation (3) take steps to publish a notice in at least one daily newspaper published in the national language and having a national circulation as determined by the Disciplinary Authority:

(a) of the fact that the officer has been absent from duty and cannot be traced; and

(b) requiring the officer to report for duty within seven days from the date of such publication.

(5) (not applicable here)

(6) If the officer fails to report for duty within seven days from the date of the publication of the notice referred to in subregulation (4), the officer shall be deemed to have been dismissed from the service with effect from the date he was absent from duty.

[36] After complying with the above and when the appellant did not respond the respondents duly published in gazette the dismissal of appellant as required under subregulation (7) of the Regulations. This subregulation reads:

The dismissal of an officer by virtue of subregulation (6) shall be notified in the Gazette.

[37] Thus, it is our considered opinion that the decision to dismiss the appellant was made under a statutory law by a body which acted within the scope of such statutory power. Though this decision involves the dismissal of an employee by an employer, much like a master dismissing his servant, which is a private law matter, the fact that there are statutory conditions and restrictions imposed by the Regulations on the conduct and dismissal of the appellant underpins the public law element in this case. This is not a case of a public authority being delegated with authority to hire and fire like what

A has occurred in *Regina v. East Birkshire Health Authority, Ex-parte Walsh and Wendal Swann v. Attorney General of the Turks and Caicos Islands*. Here, a special statutory provision bears directly upon the right of a public authority to dismiss the appellant. This injects the element of public law necessary in this context to attract the B remedies of administrative law making it amenable for judicial review.

[38] We shall now move to the next issue concerning the use of the correct procedure in a case where an aggrieved person can direct C and pursue his complaint against a public authority in a court of law for a decision made by them affecting him. *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705 is one in a series of cases of this nature. Here, the respondent, a general medical practitioner practicing in the area D administered by the appellant, was listed to provide general medical services under the National Health Service Act. His remuneration was governed by certain regulations that entitled him to receive certain basic allowance. He brought an action against the appellant for *inter alia* a declaration that the appellant was in breach of E contract in abating his basic practice allowance. The appellant applied to strike out his claim on the ground that it is an abuse of court's process since the appropriate procedure to challenge such decision is by way of judicial review and not by an action commenced by writ. The High Court allowed the appellant's F application and struck off the respondent's claim. But on appeal, the Court of Appeal permitted the respondent's claim to stand. Dissatisfied, the appellant appealed to the House of Lords. The appeal was dismissed.

G **[39]** Lord Bridge in this case said:

> The decisions of this House in *O'Reilly v. Mackman* [1982] 3 All ER 1124, [1983] 2 AC 237 and *Cocks v. Thanet DC* [1982] 3 All ER 1135, [1983] 2 AC 286 have been the subject of much academic criticism. Although I appreciate the cogency of some of H the arguments advanced in support of that criticism, I have not been persuaded that the essential principle embodied in the decisions requires to be significantly modified, let alone overturned. But, if it is important, as I believe, to maintain the principle, it is certainly no less important that its application should be confined within proper limits. It is appropriate that an issue which depends exclusively on I the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant

asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. I think this proposition necessarily follows from the decisions of this House in *Davy v. Spelthorne BC* [1983] 3 All ER 278, [1984] AC 262 and *Wandsworth London EC v. Winder* [1984] 3 All ER 976, [1985] AC 461. In the latter case Robert Goff LJ in the Court of Appeal, commencing on a passage from the speech of Lord Fraser of Tullybelton in the former case, said ([1984] 3 All ER 83 at 96, [1985] AC 461 at 480):

> I read this passage in Lord Eraser's speech as expressing the opinion that the principle in *O'Reilly v. Mackman* should not be extended to require a litigant to proceed by way of judicial review in circumstances where his claim for damages for negligence might in consequence be adversely affected. I can for my part see no reason why the same consideration should not apply in respect of any private law right which a litigant seeks to invoke, whether by way of action or by way of defence. For my part, I find it difficult to conceive of a case where a citizen's invocation of the ordinary procedure of the courts in order to enforce his private law rights, or his reliance on his private law rights by way of defence in an action brought against him, could, as such, amount to an abuse of the process of the court.

[40] Lord Lowry delivering the other opinion of the House expressed:

> The 'broad approach' was that the rule in *O'Reilly v. Mackman* did not apply generally against bringing actions to vindicate private rights in all circumstances in which those actions involved a challenge to a public law act or decision, but that it merely required the aggrieved person to proceed by judicial review only when private law rights were not at stake. The 'narrow approach' assumed that the rule applied generally to all proceedings in which public law acts or decisions were challenged, subject to some exceptions when private law rights were involved. There was no need in *O'Reilly v. Mackman* to choose between these approaches, but it seems clear that Lord Diplock considered himself to be stating a general rule with exceptions. For my part, I much prefer the broad approach, which is both traditionally orthodox and consistent with the Pyx Granite principle, as applied in *Davy v. Spelthorne BC* [1983] 3 All

A ER 278 at 283-284, [1984] AC 262 at 274 and in *Wandsworth London BC v. Winder* [1984] 3 All ER 976 at 981, [1985] AC 461 at 510. It would also, if adopted, have the practical merit of getting rid of a procedural minefield. I shall, however, be content for the purpose of this appeal to adopt the narrow approach, which avoids the need to discuss the proper scope of the rule, a point which has not been argued before your Lordships and has hitherto been seriously discussed only by the academic writers.

[41] In Malaysia, there are a number of authorities on this point. Starting with the High Court, we have the case of *Ghozi Abu Bakar v. Majlis Angkatan Tentera* [2006] 4 CLJ 291 where the plaintiff, a member of the Royal Malaysian Navy, sued by way of writ for a declaration that he was wrongly decommissioned and retired. In her judgment, Noor Azian Shaari JC (as she then was) said:

> Since the plaintiff is seeking a remedy on an allegation that a public authority that is entitled to protection under the law has exceeded or infringed the law, the plaintiff must proceed by way of a judicial review and not by way of an ordinary action ie, in the case the plaintiff has chosen by way of writ and statement of claim for an injunction or otherwise.
>
> By filing the writ and statement of claim and not by way of O. 53 RHC it appears that the plaintiff is trying to circumvent the leave requirement of O. 53 of the RHC.

[42] This was followed by *Maisi bin Galing v. Kerajaan Malaysia* (an unreported decision) where the plaintiff, a member of the Royal Malaysian Police, sought by way of a writ action to declare the defendant's decision to dismiss him was unlawful. Tee Ah Seng J dismissed the plaintiff's claim on the ground that it is an abuse of process. The proper mode should be by way of judicial review under O. 53 RHC since the plaintiff was challenging the decision made by the defendants pursuant to a Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[43] Another High Court decision against the use of a writ to commence such action rather than by way of O. 53 RHC is *Kenniah a/l Sinnasamy v. Ketua Polis Seberang Perai & 2 Ors* (Unreported). The plaintiff's claim for a declaration by way of a writ that he was unlawfully dismissed from the police force was struck out on the ground that it was an abuse of the process of the court.

[44] At the Court of Appeal, we have the case of *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697 where Gopal Sri Ram JCA (as he then was) delivering the judgment of the court said: A

> These arguments of counsel on either side bring into sharp focus the divide between private and public law remedies. In England, where the judicial review provisions are in some respects similar to ours while differing materially in other respects, cases have gone in both directions. Thus, in *Re Tillmire Common, Heslington* [1982] 2 All ER 615, 621-622 Dillon J (as he then was) following the judgment of Goulding J in *Heywood v. Hull Prison Board of Visitors* [1980] 3 All ER 594, pointed to the ill-advisedness of invoking the general provision governing declaratory relief in O. 15 r. 16 in cases of public law. The English Courts, at that stage, were very concerned that a litigant instead of taking on the heavier burden imposed by O. 53 may attempt to by-pass that rule of court by taking advantage of the less onerous and more generous private law provision in O. 15 r. 16. Even a cursory reading of the judgments in cases I have just referred to as well as the speech of Lord Diplock in *O'Reilly v. Mackman* [1982] 3 All ER 1124 make this concern clear. B C D E
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> I have thus far mentioned cases going the one way. There are several cases going in the opposite direction. I need only mention one of these. It is a decision of critical importance to English practitioners. But it also provides us much needed guidance when construing our own O. 53 which is comparatively new. The case I refer to is Trustees of the *Dennis Rye Pension Fund and Another v. Sheffield City Council* [1997] 4 All ER 747. The principal judgment was delivered by Lord Woolf MR, now Lord Chief Justice, the acknowledged authority on modern civil procedure and administrative law in the Commonwealth. There are two passages in his judgment that merit reproduction. The first appears at p. 754 where he said: F G
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> ... What I would suggest is necessary is to begin by going back to first principles and remind oneself of the guidance which Lord Diplock gave in *O'Reilly v. Mackman*. This guidance involves recognizing: (a) that remedies for protecting both private and public rights can be given in both private law proceedings and on application for judicial review; (b) that judicial review provides, in the interest of the public, protection for public bodies which are not available on private law proceedings (namely the requirement of leave and the protection against delay). H I

The second passage appears at p. 755. It reads:

> ... If it is not clear whether judicial review or an ordinary action is the correct procedure it will be safer to make an application for judicial review than commence an ordinary action since there then should be no question of being treated as abusing the process of the court by avoiding the protection provided by judicial review. In the majority of the cases it should not be necessary for purely procedural reasons to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue). If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should he heard by a judge who is not nominated to hear cases in the Crown Office List. It is difficult to see how a respondent can be prejudiced by the adoption of this course and little risk that anything more damaging could happen than a refusal of leave.
>
> Acting on this guide, it is my view that in the present case the appellant was entirely correct in invoking the provision of O. 53.

[45] Before we depart from this case to discuss others, we like first to disclose the facts in *Sivarasa Rasiah v. Badan Peguam Malaysia (supra)* and to make some observations on the judgment of the Court of Appeal.

[46] In this case *(Sivarasa Rasiah v. Badan Peguam Malaysia)* the applicant, an advocate and solicitor, was disqualified from being a member of the Bar Council by virtue of s. 46A of the Legal Profession Act due to his appointment as Vice-President of a political party. Dissatisfied with this statutory disqualification, he applied for leave for judicial review under O. 53 RHC. The High Court dismissed his application for leave. This was overturned by the Court of Appeal.

[47] Our first observation concerns the comment by the Court of Appeal on the appropriate procedure to be used in judicial review. This was *obiter dictum*. That was not the issue before the court to deliberate. The question before the Court of Appeal was whether leave should be granted in an application made under O. 53 RHC. Secondly, our O. 53 RHC, though in many respects is in *pari materia* to the English provision of O. 53 referred to by Lord Woolf in *Trustees of the Dennis Rye Pension Fund and Another v. Sheffield City*

Council, does not contain a provision to allow the court to direct an application made under O. 53 RHC to be converted into a writ action if the latter is found to be a more suitable process.

[48] In another Court of Appeal case of *Dato' Seri Anwar bin Ibrahim v. Perdana Menteri Malaysia* [2007] 3 CLJ 377, the former Deputy Prime Minister of the country has sued the Prime Minister and another by way of an originating summons for a declaration that they had acted in contravention of the Federal Constitution in dismissing him as Deputy Prime Minister and that he is still a Minister in the Malaysian Cabinet. The defendants applied to strike out the plaintiff's claim under O. 18 r. 19(1) RHC. One of the grounds advanced by the defendants was the use of an incorrect procedure; it should be by way of an application for judicial review under O. 53 RHC rather than by originating summons. The High Court allowed this application. Dissatisfied, the plaintiff appealed. His appeal was dismissed by the Court of Appeal and there Justice Heliliah JCA (as she then was) remarked:

> This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O. 53.

[49] This approached was repeated in a more recent Court of Appeal decision of *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 CLJ 192. In this case, the appellant was an engineer registered under the Registration of Engineers Act 1967 (the Act). The respondent, the Board of Engineers Malaysia, commenced disciplinary proceedings against the appellant upon complaints received about his professional performance in an engineering project. Before disciplinary proceedings could commence, the appellant applied to the High Court for a declaration that no disciplinary action can be taken against him by virtue of certain provisions of the Act. He also applied for a prohibitive injunction to

A restrain the appellant from investigating him about the complaints lodged. The High Court dismissed his application and the Court of Appeal affirmed the decision of the High Court. He then applied for leave to appeal to the Federal Court but before his application was heard, he withdrew claiming that the respondent had agreed to
B retract the disciplinary charge against him. The respondent did not withdraw the charge. Instead they revised the original charge. Before the respondent could proceed with the disciplinary hearing, the appellant applied by way of originating summons for a declaration that the appellant's revised charge against him was *ultra vires* the
C Act and bad in law. The High Court struck out his originating summons under O. 18 r. 19(1) RHC on the ground that since the appellant's application is for judicial review it should be by way of O. 53 RHC. His appeal to the Court of Appeal was dismissed on the following grounds:

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> First, we are of the view that the High Court in deliberating the application has applied the correct principle of law as set out in *O'Reilly v. Mackman* [1983] 2 AC 237 (and adopted by our courts in *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2007] 3 CLJ 377 @ 397) which is:

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> It would as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by
F way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> Secondly, we find that in substance and in fact what the appellant is requesting in his originating summons involves principally and primarily public law rights rather than private law rights.

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> Thirdly, though we are conscious of the English House of Lords decisions in *Wandsworth London Borough Council v. Winder* [1985] 1 AC 461 and *Roy v. Kensington And Chelsea And Westminster Family Practitioner Committee* [1992] 2 WLR 239 which says:

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> ... where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can
I prevent him from setting up his private law right in proceedings brought against him.

> We are of the view that the prayers sought by the appellant involve principally and primarily public law rights rather than private law rights. When they overwhelmingly concern public law rights, then the correct approach should be by way of judicial review under O. 53 RHC rather than by way of originating summons.

[50] This approach is the same as the one adopted by the Court of Appeal in the earlier case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585. Here, the plaintiffs claimed against the defendant, a public authority, for an order issued against them by the High Court regarding duties imposed upon them following the collapse of a building caused partially by their negligence. Gopal Sri Ram JCA (as he then was) delivering judgment of the court said:

> Now, assuming that there was a duty on the 4th Defendant to act in a particular manner towards the property of the plaintiffs post collapse, such duty must find its expression in public and not private law. Accordingly, if there had been a failure on the part of the 4th Defendant to do or not to do something as a public authority, the proper method is to proceed by way of an application for judicial review.

[51] In support of this proposition, the learned judge cited the case of *Trustee of the Denis Rye Pension Fund & Anor v. Sheffield City Council (supra)*.

[52] However, this point was overruled by the Federal Court on appeal. The Federal Court (*Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1 at p. 24) decided that though the principle set out in *O'Reilly v. Markman* is acceptable as a general rule it does not apply to a claim against a public authority for negligence. Such claim can be commenced by way of writ. We reproduce the pertinent part of this judgment of the Federal Court delivered by Steve Shim CJSS:

> I think the brief facts in *Trustee of Dennis Rye Pension Fund* relied on by the Court of Appeal ought to be stated. There, the plaintiffs were served with a repair notice under the Housing Act (UK) requiring work to be carried out to certain houses to render them fit for human habitation. They then applied to the Sheffield City Council for improvement grants under the Local Government & Housing Act. The council approved the application but subsequently refused to pay the grants on the grounds, *inter alia*, that the works had not been completed to its satisfaction. The plaintiffs'

commenced private law actions against the council claiming the sums due under the grants. The council contended that if the plaintiffs had any grounds of complaint (which it did not accept), the only appropriate procedure was an application for judicial review and not an ordinary action. It accordingly applied to strike out the plaintiff's claims under RSC O. 18 r. 19 and the inherent jurisdiction of the court. The district judge struck out the claims; but the judge allowed the plaintiffs' appeal and dismissed the council's application. The council appealed to the Court of Appeal.

The Court of Appeal presided by Lord Woolf MR held that when performing its role under the Local Government & Housing Act (UK) in relation to the making of grants, a local authority was in general performing public functions which did not give rise to private rights; but once an application for a grant had been approved, a duty to pay it arose on the applicant fulfilling the statutory conditions and that duty would be enforceable by an ordinary action. The court further emphasized that although, in the case before it, there was a dispute as to whether those conditions had been fulfilled, any challenge to the local authority's refusal to express satisfaction would depend on an examination of issues largely on fact – that furthermore, the remedy sought for the payment of a sum of money was not available on an application for judicial review. The court concluded that an ordinary action was the more appropriate and convenient procedure and consequently that the plaintiff's actions were not an abuse of process. The appeal was therefore dismissed.

It is clear that when the speeches by Lord Woolf MR and Pill, LJ are read in their proper perspective, they explicitly recognize that remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review. It is pertinent to note the observations made by Lord Woolf MR in explaining the seminal decision in *O'Reilly v. Mackman* [1983] 2 AC 237 when he said ...

It is in the light of the established principles stated above that the respondents in our case maintain that the Court of Appeal has erred in holding that their only cause of action against MPAJ lay in the area of public law for post-collapse liability. The respondents have relied on ordinary tort principles for their claims of negligence. In this, they are amply supported by established authorities. They should be entitled to file their claims against MPAJ by way of writ action.

[53] There is a more recent Federal Court case on this issue – *YAB Dato' Dr. Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253. But before we proceed to deal with the issue concerning an appropriate mode to commence such action let us disclose the facts of the case.

[54] The 1st appellant was the Chief Minister of the State of Perak while the 2nd to 7th appellants were State Executive Councilors. There was a complaint that the appellants had acted in contempt of the Perak State Legislative Assembly. The respondent, the Speaker of the Perak State Legislative Assembly, issued summons to the appellants directing them to appear before the Perak State Committee of Privileges (Committee). The appellants appeared under protest on the ground that they did not recognise or submit to the jurisdiction of the Committee. All the appellants were found guilty as charged by the Committee and the respondent exercising his powers as the Speaker of the Perak State Assembly, suspended them from attending further sessions of the Perak State Assembly for a period of 18 and 12 months respectively. The appellants filed originating summons in the High Court seeking *inter alia* a declaration that the respondent's decision is void on ground that it was made in contravention to the Perak State Constitution. The appellants then sought by way of motion in the Federal Court to refer certain questions of law touching on the Perak State Constitution. Though the hearing of the originating summons had commenced in the High Court, the Federal Court proceeded to entertain the motion and pursuant to art. 63 of the Federal Constitution disposed of the originating summons. At the hearing before the Federal Court and also previously in the High Court, the respondent had raised an objection that the appellants should have commenced their actions under O. 53 RHC instead of by originating summons since the appellants were challenging the decision of the respondent made in his capacity as Speaker of the Perak State Assembly.

[55] In dealing with this, Augustine Paul FCJ after scrutinizing numerous authorities, both locally and abroad, came to this conclusion:

> Clearly, the challenge of the applicants to their suspension from Legislative Assembly was a matter that affects their legal status within the meaning of s. 41. They are therefore entitled to seek a declaration of their legal right pursuant to O. 15 r. 16. It cannot be

A argued that they ought to have proceeded under O. 53 itself for declaratory relief for two reasons: Firstly, O. 53 does not say it is the exclusive provision for the grant of declaratory relief as stated by Lord Diplock in *O'Reilly v. Mackman* [1982] 3 All ER 1124 at p 1134 in the following words:

B My Lords, O. 53 does not expressly provide that procedure by application for judicial review shall be exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law, nor does s. 31 of the Supreme Court Act 1981. There is great
C variation between individual cases that fall within O. 53 and the Rules of Committee and subsequently the legislature were, I think, for this reason content to rely on the express and the inherent power to the High Court, exercised on a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordship would
D be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

E Secondly, when the Act was enacted Order 53 was not in existence and, thus, adherence to it could not have been contemplated. Be that as it may, and in any event, in cases of this nature the most appropriate form of relief is by way of declaration ...

F Accordingly, the objection raised by the respondent was dismissed.

[56] For a comprehensive understanding of this section of the judgment, we reproduce s. 41 of the Specific Relief Act and O. 15 r. 16 RHC.

G **[57]** Section 41 Specific Relief Act

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so
H entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or
I title, omits to do so.

[58] Order 15 rule 16 RHC

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

[59] This approach was adopted in a subsequent High Court case of *Kuching Waterfront Development Sdn Bhd (formerly known as Tolaz Sdn Bhd) v. Superintendent of Lands and Surveys, Kuching Division & Ors* (unreported) where David Wong J said:

> SAG however submits that Kuching Waterfront ought to have applied to the Court under Order 53 of the Rules of High Court 1980, to quash the condition. And since there was no such application Kuching Waterfront cannot challenge the reasonableness of the imposed condition now. This contention no doubt is based on the celebrated case of *O'Reilly v. Mackman* [1982] 2 All ER 1124 where the House of Lords held that, as a general rule, litigants whose rights are affected by decisions of Public Authorities such litigants must challenge those decisions by way judicial review under Order 53 and not by way of ordinary claim and failure to do that would amount to an abuse of the process of the court. A similar contention was made and discussed in the recent Federal Court's case No. 06-04-2009 (A) – *YAB Dato' Zambry bin Abd Kadir & 6 Others v. YB Sivakumar a/l Varatharaju Naidu* where the Federal Court on the 14 April 2009 held that Order 53 is not an exclusive but an alternate provision for litigants to enforce their rights affected by public authorities ... I have since obtained a copy of the judgment which I have read and agree with.

[60] In view of the various decisions on this point, particularly that of *YAB Dato' Dr. Zambry,* it is necessary for this court to clarify the law on this "procedural minefield" (as described by Lord Lowery in *Roy v. Kensington and Chelsea FPC (supra)*.

[61] Aside from *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others described under the pre-amended O. 53 RHC, an alternative remedy for an aggrieved party seeking relief against a public authority for infringement of rights to which he was entitled to be protected under public law is for a declaration. The courts had for a long time recognized their power to grant a declaration under common law. But s. 41 of the Specific Relief Act 1950 armed them with the statutory authority to do so. It is also commonly accepted that O. 15 r. 16 RHC also provides the High Court with such

power (see Lord Diplock's judgment in *O'Reilly v. Mackman (supra)* at p. 1127). However, O. 53 RHC sets out a specific procedure for an aggrieved party seeking relief, incorporating a declaration (as provided by s. 41 of the Specific Relief Act) against a public authority for infringement of his rights to which he was entitled to be protected under public law, to follow. It is our view that when such an explicit procedure is created (as compared to a general provision set out under O. 15 r. 16 RHC) to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O. 53 RHC, otherwise it is liable to be struck off for abusing the process of the court. This general rule enunciated in *O'Reilly v. Mackman (supra)* has in fact been acknowledged by this court in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors (supra)* and repeated in *YAB Dato' Dr. Zambry (supra)*. However, like all general rules, there are exceptions. This again was recognised by Lord Diplock in *O'Reilly v. Mackman* where he referred to "particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties objects to the adoption of the procedure by writ, or originating summons". Then of course there is the exception for a claim against the public authority for negligence as decided in *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors*. There may be others and these "are left to be decided on a case to case basis" as spoken by Lord Diplock in *O'Reilly v. Mackman.* The circumstances in *YAB Dato' Dr. Zambry* is obviously one such exception where this court found that a challenge by the appellants on their suspension from attending a State Legislative Assembly is a matter that affects their legal status. For this, the aggrieved party can commence their claim by way of an originating summons rather than an application under O. 53 RHC.

[62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim for infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has a substantial public law element then the procedure under O. 53 RHC must be

adopted. Otherwise, it may be set aside on the ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 RHC is not suitable. Aside from this, there could be other circumstances like the kind in *YAB Dato' Dr. Zambry*. Much depends on the facts of the case. But generally the court should be circumspect in allowing a matter which should be by way of O. 53 RHC to proceed in another form. To say that it is open to an applicant seeking judicial review to elect any mode he prefers, as implied in *Kuching Waterfront*, would, in our considered opinion, be rendering O. 53 RHC redundant. This is certainly not the intention of the drafters of this rule who had a purpose in mind. When the purpose of this rule is in the interest of good administration, then this rule must be adhered to, except in the limited and exceptional circumstances discussed.

[63] With this, we have answered the 1st question posed to us.

[64] As to the second question, we are of the firm conviction that the appellant's claim for infringement of his rights by the respondents is based solely on public law. There is no trace of private law involvement nor do the circumstances justify it to be an exception to the general rule. For this, we agree with the courts below that the appellant's writ should be struck off as an abuse of the court's process.

Conclusion

[65] Accordingly, we dismiss this appeal with costs. Deposit for this appeal to the respondent towards account of costs.